Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1150

CONCERNED CITIZENS
OF SOUTHERN OHIO, INC., ET AL.,
Appellants,

v.

THE PINE CREEK
CONSERVANCY DISTRICT, ET AL.,
Appellees.

ON DIRECT APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Opinion Below

The three judge court's memorandum delivered August 29, 1977, in the United States District Court for the Southern District of Ohio, Western Division styled below as case number C-1-75-5 is not officially reported to date. A copy is attached to this jurisdictional statement.

Grounds For Jurisdiction

Plaintiffs filed an action entitled *Concerned Citizens of Southern Ohio, Inc., et al. v. The Pine Creek Conservancy District, et al.* for declaratory relief, injunctive relief, and damages pursuant to the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. Sections 1983, 1985(3), and 1986 asserting the unconstitutionality of the Ohio Conservancy Act, Chapter 6101, Ohio Revised Code. A three judge district court was convened under authority of 28 U.S.C. Section 2281.

By order entered September 19, 1977, the United States District Court for the Southern District of Ohio overruled, rejected and dismissed the claims of the plaintiffs that various sections of Chapter 6101 of the Ohio Revised Code are unconstitutional. The notice of appeal was filed October 19, 1977, in the United States District Court for the Southern District of Ohio, Western Division.

This court has jurisdiction to consider this appeal under 28 U.S.C. Section 1253. *Florida Lime and Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, 80 S.Ct. 568, 4 L. Ed. 2d 568 (1960); *Brotherhood of Locomotive Engineers v. Chicago, R.I. & P.R. Co.*, 382 U.S. 423, 86 S.Ct. 594, 15 L. Ed. 2d 501 (1966); *Hicks v. Miranda*, 422 U.S. 332, 95 S.Ct. 2281, 45 L. Ed. 2d 223 (1975).

STATUTES INVOLVED

The validity of the following statutes of the State of Ohio are involved, the text of which are set out verbatim in Appendix A:

a. Section 6101.05, Page's Ohio Revised Code Annotated, Title 61, Supplement page 58.
b. Section 6101.07, Page's Ohio Revised Code Annotated, Title 61, Supplement page 59.
c. Section 6101.08, Page's Ohio Revised Code Annotated, Title 61, Supplement page 60.
d. Section 6101.13, Page's Ohio Revised Code Annotated, Title 61, Supplement pages 61 and 62.
e. Section 6101.33, Page's Ohio Revised Code Annotated, Title 61, Supplement pages 70 and 71.
f. Section 6101.34, Page's Ohio Revised Code Annotated, Title 61, Supplement page 71.
g. Section 6101.45, Page's Ohio Revised Code Annotated, Title 61, Supplement pages 75 and 76.
h. Section 6101.48, Page's Ohio Revised Code Annotated, Title 61, Supplement pages 77 and 78.

The Ohio Conservancy Act, Chapter 6101, Ohio Revised Code, provides for the creation and management of conservancy districts. Under this Chapter, conservancy districts are given a variety of powers to deal with flood control, water supply, channel improvement, drainage, irrigation, sewage disposal, recreation and many other matters. Section 6101.05, Ohio Revised Code. The Act creates the "Conservancy Court" made up of one judge from each county included in whole or in part within the proposed District.

The authority of the Conservancy Court is absolute — combining all the traditional branches of government: judicial, executive and legislative.

The Conservancy Court performs a variety of judicial functions including a determination of whether a legally sufficient petition to create the District has been filed (Section 6101.07, Ohio Revised Code), holding hearings on exceptions to the appraisers' report and thereafter confirming benefits, damages and appraisals of property (Section 6101.33, Ohio Revised Code) which then is used as the basis for assessment of project costs and compensation for property later appropriated by the District (Section 6101.28, Ohio Revised Code). Furthermore, appeal by a property owner is to the local Common Pleas Court under Sections 163.01 to 163.32, Ohio Revised Code, an appeal back to the same Court from which the members of the conservancy court came (Section 6101.35, Ohio Revised Code).

In addition to performing judicial functions, the conservancy court also is the chief governing body of the conservancy district — the ultimate executive authority in the district. With no requirements for notice, hearing, or public participation, the conservancy court appoints the board of directors (Section 6101.10, Ohio Revised Code) and the board of appraisers (Section 6101.27, Ohio Revised Code); through these two bodies the district is governed. The conservancy court also is responsible for final approval of the Official Plan of projects with no standards for setting district policy (Section 6101.13, Ohio Revised Code), for setting rates for water provided by the district (Section 6101.24, Ohio Revised Code), for levying taxes to pay for recreational facilities (Section 6101.25, Ohio Revised Code), for holding an annual meeting to examine the annual report of the district (Section 6101.66, Ohio Revised Code), and for establishing compensation for

directors and appraisers (Section 6101.67, Ohio Revised Code). Just as shareholders of a private corporation, the conservancy court has ultimate control and responsibility for the actions of the corporate body of the district.

This discussion also indicates that the conservancy court, in determining whether to create a district or approve the plan, and in other ways, is making major policy decisions which amount to legislation for the conservancy district. Thus, a conservancy district is a general governmental body and the conservancy court is responsible for its most significant actions of a judicial, executive and legislative nature.

Questions Presented

1. Do the aforesaid sections of the Ohio Revised Code violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution because the conservancy court members sit in judgment of judicial cases in which they have an interest because they have executive responsibility for management and success of the district and receive specific additional remuneration for their service?

2. Do the aforesaid sections of the Ohio Revised Code violate the Equal Protection of the Laws clause of the Fourteenth Amendment to the United States Constitution because the governing body of a conservancy district consists of members elected from districts of unequal size?

3. Do the aforesaid sections of the Ohio Revised Code violate the Equal Protection of the Laws clause of the Fourteenth Amendment to the United States Constitution by permitting a municipality or other local governing body to sign a petition for creation of

a conservancy district, which action has the same effect as each freeholder of such political subdivision signing the petition, and thus discriminating between those persons living within and without such political subdivisions?

Statement Of The Case

Pine Creek, a tributary of the Ohio River, is located in the southern Ohio counties of Lawrence and Scioto. The watershed of Pine Creek is essentially rural with a population of some 17,000 people. In 1966 the Pine Creek Conservancy District was formed following the procedure outlined in Chapter 6101 of the Ohio Revised Code. It includes the portions of the watershed in Scioto and Lawrence counties, an area of approximately 117,800 acres. In April, 1968, the District adopted a plan which includes a number of dam and channelization projects. In January, 1972, the Conservancy District notified the landowners within the District of the appraisal of their property, and opposition to the District formed.

The present action was filed January 7, 1975, by opponents of the Pine Creek Conservancy District alleging the Ohio Conservancy Act is unconstitutional, fraud in the formation of the District, and violations of federal Civil Rights statutes. It was filed by residents and property owners for themselves and as a class action.

Plaintiffs filed for a preliminary injunction on February 14, 1975, and the matter was set for hearing. Based on representations of counsel for defendants that various actions plaintiffs requested be preliminarily enjoined would not be taken without fourteen days' notice to plaintiffs' counsel and the court,

plaintiffs agreed to and the District Court entered an indefinite continuance of the hearing on the preliminary injunction. The parties then conferred regarding the most expeditious means of resolving the dispute and submitted recommendations to the court. The court ordered that the parties brief the issues of the constitutionality of the Ohio Conservancy Act for submission to a three judge court and that other issues not requiring a three judge panel be considered thereafter. After briefing, the court filed a Memorandum Opinion on July 6, 1976, refusing to hold the Conservancy Act provisions attacked by Appellants unconstitutional, and a judgment order dismissing the constitutional claims for relief was filed August 23, 1976. This order was appealed to this Court which reversed the District court in a *per curiam* decision on February 22, 1976. *Concerned Citizens of Southern Ohio, Inc. v. Pine Creek Conservancy District*, ... U.S. ..., 97 S.Ct. 828, 51 L. Ed. 2d 116 (1977). On remand the parties submitted additional briefs and the District Court in a second *per curiam* memorandum opinion rejected Appellants' claims of unconstitutionality. This decision was journalized in a judgment order dismissing the constitutional claims for relief filed September 19, 1977. Appellants filed notice of this appeal October 19, 1977.

SUBSTANTIAL QUESTIONS ARE PRESENTED

Appellants base their claim that the Ohio Conservancy Act violates the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution on the rationales set forth in *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L. Ed. 749, 50 ALR 1256 (1927); *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S.Ct. 80, 34 L. Ed. 2d 267 (1972); *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L. Ed. 2d 633 (1961); and *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L. Ed. 2d 506 (1964).

I. THE PROVISIONS OF THE OHIO CONSERVANCY ACT, CHAPTER 6101 OF THE OHIO REVISED CODE, WHICH GIVE THE COURT ULTIMATE RESPONSIBILITY FOR THE FINANCIAL AND ADMINISTRATIVE SUCCESS OF THE DISTRICT WHILE STILL PLACING JUDICIAL AUTHORITY IN THE HANDS OF THE COURT AND WHICH AUTHORIZE SUPPLEMENTAL PAYMENT OF THE JUDGE OUT OF FUNDS OF THE CONSERVANCY DISTRICT WHEN FULFILLING DUTIES UNDER THE ACT VIOLATE THE PROHIBITION AGAINST DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW FOUND IN THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The controlling executive body of a conservancy district under the Ohio Conservancy Act is the Conservancy Court, which appoints the Board of Directors and the Board of Appraisers. The Conservancy Court also sits as a court to determine judicial disputes when exceptions are filed to decisions of the appraisers on valuation of land for appropriation or assessment purposes. Further compounding the problem, appeals from appraisal decisions of the conservancy court in appropriation cases must be made to the Court of Common Pleas, from which the members of the conservancy court are drawn.

This Court has established the principle that due process is violated when the outcome of the case will affect programs over which a court, in another capacity, has executive authority. *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S.Ct. 80, 34 L. Ed. 2d 267 (1972) or when a court has a financial interest in the outcome of a proceeding before it, *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L. Ed. 749, 50 ALR 1256 (1927).

The Court below, concentrating only on the question of formation of the district and ignoring the fact that the court also awards damages, sets compensation for the taking of land, and assesses the cost of projects, held that legislative and not adjudicatory functions are involved and thus, apparently, Appellants are not entitled to an unbiased tribunal. As even the dissent in this Court recognized, "[T]he majority of the functions of the Conservancy Court are admittedly judicial, ..." . . . U.S. . . . , 97 S.Ct. 832, 51 L. Ed. 2d 122. By considering only one function of the Conservancy Court, the District Court has again succeeded in ignoring the issue Appellants have attempted for more than three years to present for decision.

Under the Ohio statutes, both the possibility of bias because of the combination of executive and judicial functions, *Ward v. Village of Monroeville*, *supra*, and

the possibility of bias because the members of the Court receive compensation as a result of the specific outcomes of controversies they hear, *Tumey v. Ohio, supra,* are present.

As this Court stated in *In re Murchison,* 349 U.S. 133, 75 S.Ct. 623, 99 L. Ed. 942 (1955), "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the *probability* of unfairness." The interest of the conservancy court in the outcome of numerous adjudications coming before it creates a probability of bias, at least unconscious bias. Appellants have shown the executive and financial interest of the conservancy court in judicial cases before it at a level equivalent to that shown in *Ward v. Village of Monroeville, supra, Tumey v. Ohio, supra,* and *Gibson v. Berryhill,* 411 U.S. 564, 93 S.Ct. 1689, 36 L. Ed. 2d 488 (1973). To the extent that a court performs judicial functions, the Constitution requires that it be free of such biases.

II. SECTION 6101.07, OHIO REVISED CODE, PROVIDING FOR A CONSERVANCY COURT MADE UP OF ONE JUDGE FROM EACH COUNTY IN WHOLE OR PART WITHIN THE DISTRICT IS UNCONSTITUTIONAL AS IT DEPRIVES LANDOWNERS AND VOTERS WITHIN THE DISTRICT OF THE EQUAL PROTECTION OF THE LAWS.

Section 6101.07, Ohio Revised Code, provides that the conservancy court shall be made up of one judge from each county included in whole or in part within the district. The members of the conservancy court

are thus elected in an at large election in their respective counties. The conservancy court controls a governmental body in levying assessments and taxes, appropriating property, building lakes, rechanneling streams, providing water and sewage service, building and managing recreational facilities and numerous other governmental activities.

The system of using Common Pleas Court judges to govern the conservancy district results in unequal representation. As an example, the Pine Creek Conservancy District lies partially in Lawrence County and partially in Scioto County. In neither instance is the entire county included in the district. The population of Lawrence County in 1970 was 56,868 and the population of Scioto County was 76,951. (The Miami Conservancy District contains part of Montgomery, population 606,148, and neighboring Miami, population 84,342, counties.) U. S. Department of Commerce Bureau of Census, *Number of Inhabitants Ohio* Table 9, "Population and Land Area of Counties: 1970 and 1969." The judge from each county has equal voting power in making decisions for the conservancy court. No attempt is made to approximate the voting power of the judges to the number of people they represent, or to the land or people within the district which they represent. A voter in the Scioto County portion of the district has less say in choosing the conservancy court than does a voter in the Lawrence County portion of the district; his vote is debased. This results necessarily from the statutory scheme.

In governmental bodies, the Equal Protection clause requires equal representation. The requirement of "one man—one vote" was defined in *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L. Ed. 2d 506 (1964), and

is applicable to local institutions of government. *Avery v. Midland County*, 390 U.S. 474, 88 S.Ct. 1114, 20 L. Ed. 2d 45 (1968), *Abate v. Mundt*, 403 U.S. 182, 91 S.Ct. 1904, 29 L. Ed. 2d 399 (1971).

However, Appellants' position does not depend upon a determination that the conservancy district is a general governmental body. While distinctions are permitted between citizens or groups of citizens which are *rationally* related to legitimate purposes of statutes, an invidious discrimination unrelated to such a purpose is prohibited by the Fourteenth Amendment.

> "It is true that this Court has firmly established the principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution. But we also held many times that 'invidious' distinctions cannot be enacted without a violation of the Equal Protection Clause." *Williams v. Rhodes*, 393 U.S. 2330, 89 S.Ct. 5, 21 L. Ed. 2d 24 (1968).

The distinction made between the weight given votes of freeholders in Scioto and Lawrence Counties in the present case is unrelated to any rational purpose of the state in providing for the government of conservancy districts, and it is clearly invidious to those whose influence on decisions of the district is diluted because of the accident of where they reside.

Unlike the present case, *Salyer Land Co. v. Tulare Water District*, 410 U.S. 719, 93 S.Ct. 1224, 35 L. Ed. 2d 659 (1973), involved a form of discrimination rationally related to the purpose of the state in setting up water districts. The issue presented there, as stated by Mr. Justice Rehnquist, was whether there was a denial of equal protection ". . . in that only landowners are permitted to vote in water storage district general elections, and votes in those elections are apportioned according to the assessed valuation of the land." 410 U.S. 719, 724. This is clearly a different form of discrimination from that presented in the present case. While the Court in *Salyer* found a rational relationship between the functions of the district relating to landowners only, it in no way sanctioned discrimination between landowners in different parts of the district involved. No justification exists for a person in Lawrence County to have greater influence in decision making of the district than persons in Scioto County. In simple fact, this case and *Salyer* present completely different issues: Here the discrimination is irrational and invidious while there it was rationally related to the purposes of the district. No statement of facts reasonably may be conceived to justify Ohio's decision to give greater weight to the votes of those on one side of a county line than those on the other side. *See* 410 U.S. 719, 732.

The basic principle of equal treatment of persons similarly situated found in the Fourteenth Amendment is violated by the Ohio Conservancy Act. There is no rational purpose in permitting freeholders in one county greater influence than those in another county. It is the simplest form of invidious discrimination, justified by no reason.

III. THE PROVISION OF SECTION 6101.05, OHIO REVISED CODE, PERMITTING A POLITICAL SUBDIVISION TO SIGN A PETITION FOR CREATION OF A CONSERVANCY DISTRICT ON BEHALF OF ALL ITS FREEHOLDERS VIOLATES THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF

THE UNITED STATES BY DISENFRANCHISING SOME BUT NOT ALL FREEHOLDERS WITHIN THE DISTRICT.

Section 6101.05, Ohio Revised Code, submits the first decision in the creation of a conservancy district to the freeholders, who must petition for its creation. This is the only step in the entire procedure which calls for any participation in support or opposition by the residents or landowners to the creation of the district or the execution of its projects. All later hearings provided by the statute are judicial and not legislative in nature—to prevail the opponent must deny and prove untrue the statements in the petition. Section 6101.08, Ohio Revised Code.

Section 6101.05, Ohio Revised Code, provides that the petition may be signed by the governing body of any public corporation in the proposed district. When such a public corporation signs the petition, all freeholders within it are conclusively presumed to favor creation of the district. In effect, all persons living in the three townships and one village which signed the petition who opposed the district were deprived of the right to oppose the district. Discrimination in public affairs between geographical areas is proscribed by the Equal Protection clause. *Moore v. Ogilvie*, 394 U.S. 814, 89 S.Ct. 1493, 23 L. Ed. 2d 1 (1969). There is no rational basis for such discrimination under the Ohio Conservancy Act.

CONCLUSION

It is submitted that the questions raised by this appeal are substantial, that the District Court below has erred, and that this Court should fully hear these three issues and prepare definitive opinions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon Duke W. Thomas, Vorys, Sater, Seymour & Pease, 52 East Gay Street, Columbus, Ohio 43215, Attorneys for Appellees, by ordinary mail this .... day of February, 1978.

MICHAEL N. TOUSEY

§ 6101.05 Petition to establish conservancy district.

Proceedings for the establishment of a conservancy district shall be initiated only by the filing of a petition in the office of the clerk of the court of common pleas of one of the counties containing territory within the proposed district, which petition shall be signed either by five hundred freeholders, or by a majority of the freeholders, or by the owners of more than half of the property, in either acreage or value, within the limits

of the territory proposed to be organized into a district. Such petition may be signed by the governing body of any public corporation or watershed district created under section 6105.02 of the Revised Code lying wholly or partly within the proposed district, in such manner as it prescribes, and when so signed by such governing body such a petition on the part of the said governing body shall fill all the requirements of representation upon such petition of the freeholders of such public corporation or watershed district, as they appear upon the tax duplicate; and thereafter it is not necessary for individuals within said public corporation or watershed district to sign such a petition. Such a petition may also be signed by railroads and other corporations owning lands.

Such petition may be filed by any city interested in some degree in the improvement, upon proper action by its governing body.

The petition shall set forth the proposed name of said district, the necessity for the proposed work and that it will be conducive to the public health, safety, convenience, or welfare, and a general description of the purpose of the contemplated improvement, and of the territory to be included in the proposed district. Said description need not be given by metes and bounds or by legal subdivisions, but it is sufficient if a generally accurate description is given of the territory to be organized as a district. Said territory need not be contiguous, provided it is so situated that the public health, safety, convenience, or welfare will be promoted by the organization as a single district of the territory described. Except in the case of a subdistrict organized in pursuance of section 6101.71 of the Revised Code, said territory shall not be included wholly within the limits of a single municipal corporation.

Said petition shall pray for the organization of the district by the name proposed.

Upon the filing of such petition a judge of the court of common pleas of the county wherein the petition was filed shall determine whether it bears the necessary signatures and complies with the requirements of this section as to form and content. No petition with the requisite signatures shall be declared void because of alleged defects, but the judge, or the court in subsequent proceedings, may at any time permit the petition to be amended in form and substance to conform to the facts by correcting any errors in the description of the territory, or in any other particular. Several similar petitions or duplicate copies of the same petition for the organization of the same district may be filed and shall together be regarded as one petition. All such petitions filed prior to the determination of the sufficiency of said petition shall be considered as though they had been filed with the first petition placed on file.

In determining when a majority of landowners has signed the petition, the names as they appear upon the tax duplicate govern and are prima-facie evidence of such ownership.

§ 6101.07 Organization of court; powers and jurisdiction.

Upon the determination of a judge of the court of common pleas that a sufficient petition has been filed in such court in accordance with section 6101.05 of the Revised Code, he shall give notice thereof to the court of common pleas of each county included in whole or in part within the proposed conservancy district. The judge of the court of common pleas of each such county, or in the case of any county having more than one such judge, one judge assigned by order of the judges of the court of common pleas thereof, shall sit

as the court of common pleas of the county wherein the petition was filed to exercise the jurisdiction conferred by sections 6101.01 to 6101.84, inclusive, of the Revised Code. In case of the inability to serve of the judge of any county having only one judge, the chief justice of the supreme court, upon application of any interested person and proper showing of need, may assign a judge from another county to serve as a judge for such county during the disability of its local judge. The court of any county, presided over by the judges provided for in this section, may establish conservancy districts when the conditions stated in section 6101.05 of the Revised Code are found to exist. Except as otherwise provided by sections 6101.08 to 6101.84, inclusive, of the Revised Code, such court has, for all purposes of sections 6101.01 to 6101.84, inclusive, of the Revised Code, original and exclusive jurisdiction coextensive with the boundaries and limits of the district or proposed district and of the lands and other property included in, or proposed to be included in, such district or affected by such district, without regard to the usual limits of its jurisdiction. The judges of the court shall meet in the first instance upon the call of the judge determining the sufficiency of the petition and shall elect one of their number as presiding judge. Each judge when sitting as a member of the court shall receive such compensation and allowance for expenses as provided by law for a judge of the court of common pleas serving by assignment outside the county wherein he resides, which shall be paid as other expenses of the organization or operation of the district are paid.

The court shall adopt rules of practice and procedure not inconsistent with sections 6101.01 to 6101.84, inclusive, of the Revised Code, and the general laws of

this state. If the court consists of more than three judges, it may designate three of its members from three different counties to preside over the court, hear matters coming before the court, and make determinations and decisions or findings and recommendations, as the rules of the court provide, with respect to any matters authorized by such rules, the disposition of which is vested in the court, except that it shall not make final decisions and orders as to:

(A) The establishment, dissolution, or merger of the district or of subdistricts thereof;

(B) The adoption, rejection, or amendment of the official plan;

(C) The appointment and removal of directors and appraisers;

(D) The confirmation of the appraisers' report of benefits, damages, and appraisals of property;

(E) The authorization of maintenance assessments in excess of one per cent of benefits;

(F) The authorization of a readjustment of the appraisal of benefits in accordance with section 6101.54 of the Revised Code;

(G) The approval of the method of financing improvements and activities under section 6101.25 of the Revised Code;

(H) The determination of rates of compensation for water under sections 6101.24 and 6101.63 of the Revised Code;

(I) The examination of the annual report of the board of directors of the conservancy district as provided under section 6101.66 of the Revised Code.

The concurrence of two of the three judges so designated shall be necessary for an action or determination

thereby and it has, if so provided by the rules of the court, the same effect as though taken or made by the full court. All actions and determinations by the full court require the affirmative vote of a majority of the judges constituting the court. In all cases in which the judges are evenly divided that side with which the presiding judge votes shall prevail. In the event the court consists of two judges and they find themselves unable to agree on any question left to their decision, a judge of the court of common pleas of some other county shall be designated by the chief justice of the supreme court to sit and vote as a third member of the court until such question is decided.

When the court by its order entered of record decrees that a subdistrict be organized, the judge of the court of common pleas of each county included in whole or in part in the subdistrict, or in the case of any such county having more than one such judge, one judge assigned by order of the judges of the court of common pleas thereof, shall sit as the court of common pleas, with jurisdiction in all matters relating to the subdistrict, the disposition of which is vested in the court, except those listed in paragraph[s] (A), (C) and (I) of this section, which shall remain the responsibility of the full court.

§ 6101.08 Hearing on petition; order establishing conservancy district; appeal.

At the preliminary meeting of the court it shall fix the time and place of the hearing on the petition for the establishment of the proposed conservancy district, which hearing shall be held not later than sixty days thereafter, and the clerk of such court shall give notice of such hearing by publication. Any owner of real property in a proposed district who individually has

not signed such a petition and who wishes to object to the organization and incorporation of said district shall, on or before the date set for the cause to be heard, file his objections to the organization and incorporation of such district. Similarly, objections may be filed by any public corporation which has not signed such petition. Such objections shall be limited to a denial of the statements in the petition, and shall be heard by the court as an advanced case without unnecessary delay.

Upon the hearing, if it appears that the purposes of sections 6101.01 to 6101.84, inclusive, of the Revised Code, would be subserved by the creation of a district, the court, after disposing of all objections as justice and equity require, shall by its findings, duly entered of record: adjudicate all questions of jurisdiction; determine that the organization of the district for the purposes for which it is being organized, and that the surveys, plans, appraisals of benefits and damages, estimates of cost, land options, and the preparation of an official plan will benefit the area within the territorial boundaries of the district; declare the district organized; give it a corporate name by which in all proceedings it shall thereafter be known. A district so organized shall be a political subdivision of the state and a body corporate with all the powers of a corporation, and shall have perpetual existence, with power to sue and be sued, to incur debts, liabilities, and obligations, to exercise the right of eminent domain and of taxation and assessment as provided in such sections, to issue bonds, and to do all acts necessary and proper for the carrying out of the purposes for which the district was created and for executing the powers with which it is invested.

In such decree, the court shall designate the place where the office or principal place of business of the district shall be located, which shall be within the corporate limits of the district if practicable, and which may be changed by order of court. The regular meetings of the board of directors of the district shall be held at such office or place of business, but for cause may be adjourned to any other convenient place. The official records and files of the district shall be kept at such office except as otherwise approved by the court.

If the court finds that the property set out in said petition should not be incorporated into a district, it shall dismiss said proceeding, and adjudge the costs against the signers of the petition in the proportion of the interest represented by them.

After an order is entered, either dismissing the petition or establishing the district, such order is a final order and may be appealed by any interested party or by the state, within twenty days from the date that the order is entered. The organization of said district shall not be directly or collaterally questioned in any suit, action, or proceeding except as expressly authorized in sections 6101.01 to 6101.84, inclusive, of the Revised Code.

§ 6101.13 Official plan for district; hearing; approval by environmental protection agency.

Upon its qualification, or as soon thereafter as practicable, the board of directors of a conservancy district shall prepare a plan for such part or parts of the improvements for which the district was created as the board of directors shall deem advisable. Such plan shall be filed in accordance with this section, within two years from the date of the order establishing the district. The court may grant extensions of

time allowed for the filing of the plan if the board of directors so requests, for good cause shown. No plan or portion of a plan shall be prepared providing a water supply for domestic, industrial, or public use, or providing for the collection and disposal of sewage and other liquid wastes, for any municipal corporation, unless the governing body of such municipal corporation has petitioned the board to provide a water supply or a system for the collection and disposal of sewage and other liquid wastes, or has signed the petition initiating the proceeding by which the district acquired authority to undertake such improvements. Such plan shall include such maps, profiles, plans, and other data and descriptions as are necessary to set forth properly the location and character of the work and of the property benefited or taken or damaged, with estimates of cost for doing the work, including the proportion of the total cost to be assessed within the district, a breakdown of the sources of funds to be used in making the improvements, and the extent of participation, if any, by other political agencies in constructing the work.

If the board finds that any former survey made by any other district or in any other matter is useful for the purposes of the district, the board may take over the data secured by such survey, or such other proceedings as is useful to it, and may pay therefor an amount equal to the value of such data to said district. No construction shall be made under sections 6101.01 to 6101.84 of the Revised Code, which will cause the flooding of any municipal corporation or which will cause the water to back up into any municipal corporation, unless the board has acquired and paid for the right to use the land affected for such purpose, and has paid all damages incident thereto. No railroad shall be re-

quired to be constructed with a grade in excess of the maximum ruling grade then existing upon that division of said railroad whereon said change is required.

Upon the completion of such plan, the board shall file a copy thereof with the environmental protection agency which may approve or reject any provisions thereof relating to the supplying of water for domestic, industrial, and public use or to the collection and disposal of sewage and other liquid wastes. In deciding whether to approve or reject such provisions, the agency shall consider, among other factors, the protection of the public health, and compliance with air and water quality standards and regulations and solid waste disposal requirements. If the department rejects such provisions or refers them back for amendment, the board shall prepare other or amended provisions relating thereto. If the agency approves the provisions, it shall certify a copy of its action to the board, which shall file it as a record of the district.

Upon the completion of the plan and the approval by the agency, the board shall cause notice of the completion of such plan to be given by publication in accordance with section 6101.01 of the Revised Code, and shall file a copy of such plan in the office of the clerk of the common pleas court of each county in which works of improvement are proposed, or in which property would be benefited, damaged, or taken by the execution of such plan. Such copies shall be available for inspection by all persons, public corporations, and agencies of the state government interested. The board shall make copies of the plan available to any interested party, such copies to be supplied only at the cost thereof.

Said notice shall fix the times and places for the hearing of all objections to said plan which shall be

not less than twenty nor more than thirty days after the last publication of said notice. The board, or its duly appointed representative under this section, may, upon motion and for good cause shown, or upon its or his own motion, grant continuances to a day certain of the hearing on the plan. Such continuances shall not necessitate additional notice. All objections to said plan shall be in writing and filed with the secretary of the conservancy district at his office not more than twenty days after the last publication of said notice. A hearing on the objections so filed shall be provided for by the board in the county seat of each county in which a copy of the plan has been filed as required by this section, but such hearing may be canceled in any county from which no objections have emanated either from a resident or owner of property located therein. The board may, if it deems necessary, appoint one or more representatives each of whom shall be assigned by the board to conduct one or more of the hearings on the objections as required by this section and to cause a record to be made of each of such hearings and to report such record back to the board. After said hearings, the board shall adopt the plan with or without modifications as the official plan of the district. Within ten days after the adoption of the official plan by the board, the secretary of the conservancy district shall certify a copy thereof and deposit it with the clerk of the court who shall file it in the original case. If any person, public corporation, or agency of the state government objects to said official plan, so adopted, then such person, public corporation, or agency of the state government may, within thirty days from the adoption of said official plan, file their objections in writing, specifying the features of the plan to which they object, in the original case estab-

lishing the district in the office of the clerk of the court. The clerk of the court shall fix a day for a hearing upon said official plan before the court which shall not be less than twenty nor more than thirty days after the time fixed for filing objections, at which time the court shall hear any objections so filed and approved, reject, or refer back said plan to the board.

The court may, upon motion and for good cause shown, or upon its own motion, grant continuances to a date certain of the hearing on the plan when it is made to appear to the court that further time is needed for study of the plan by objectors. Such continuances shall not necessitate additional notice. If the court rejects said plan, the board shall proceed as in the first instance under this section to prepare another plan. If the court refers said plan to said board for amendment, then the court shall continue the hearing to a day certain without publication of notice. If the court approves said plan as the official plan of the district, a certified copy of the journal entry of the court shall be filed with the secretary, and by him incorporated into the records of the district. The board, with the approval of the court, may alter or add to the official plan until the appraisal record is filed, and of all such alterations and additions the board of appraisers of the conservancy district shall take notice; but if in the judgment of the court any such alteration or addition is material in character, the procedure thereon shall be the same as on the adoption of the plan. After the appraisal record has been filed in court, no alterations of the official plan or additions thereto shall be made except as provided in section 6101.39 of the Revised Code.

The board of directors of a conservancy district shall have full power and authority to devise, prepare for,

execute, maintain, and operate all works or improvements necessary or desirable to complete, maintain, operate, and protect the official plan. It may secure and use men and equipment under the supervision of the chief engineer or other agents, or it may let contracts for such works, either as a whole or in parts.

§ 6101.33 Hearing on appraisals; filing exceptions; special master commissioners.

Any property owner or public corporation may accept the appraisals in its favor of benefits and of damages and of lands to be taken made by the board of appraisers of a conservancy district, or may acquiesce in the board's failure to appraise damages in its favor, and shall be construed to have done so unless within thirty days after the last publication provided for in section 6101.32 of the Revised Code, or such additional time as may be granted by the presiding judge of the court, it files exceptions to said report or to any appraisal of either benefits or damages or of land to be taken which may be appropriated. All exceptions shall be heard by the court beginning not less than forty nor more than fifty days after the last publication provided for in such section, and determined in advance of other business so as to carry out, liberally, the purposes and needs of the district. The court shall provide for the hearing on the exceptions in the county seat of each county wherein property is located with respect to which an exception or exceptions have been filed at a time and place fixed by the court. Notice of the time and place of the hearing of his exception shall be given the exceptor in such manner as the court may direct. The hearing conducted in a particular county shall be limited to testimony presented by the district and by exceptors whose exceptions relate to property

located within said county. The court may, if it deems necessary, appoint one or more special master commissioners each to be assigned by the court to conduct one or more of the hearings on the exceptions as required by this section and to cause a record to be made of each of such hearings and to report such record, together with findings and recommendations, back to the court. Such special master commissioners shall have the usual powers possessed by special master commissioners as specified in section 2315.42 of the Revised Code, shall have the cooperation of the officials of the district in determining any facts relative to the appraisal report, and may use any abstracts, title certificates, title reports, or other information that the district has relative to any of the properties included on the appraisal report. The court may cancel the scheduled hearing in any county having few exceptors, providing such exceptors are given advance notice, in such manner as the court may direct, of the time and place of hearing in a nearby county at which they shall be heard upon their several objections. The court may, if it deems necessary, return the report to the board for its further consideration and amendment, and enter its order to that effect. If the appraisal record as a whole is referred back to the board, the court shall not resume the hearing thereof without new notice, as for an original hearing thereon. The court may, without losing jurisdiction over the appraisal record, order the board to recast the appraisal record when the order of the court specifies the precise character of the changes thereof.

§ 6101.34 Decree on appraisals.

If it appears to the satisfaction of the court after having heard and determined all the exceptions filed

pursuant to section 6101.33 of the Revised Code that the estimated cost of constructing the improvement contemplated in the official plan is less than the benefits appraised, then the court shall approve and confirm the report of the board of appraisers of a conservancy district as modified and amended, and, except as otherwise provided in sections 6101.43, 6101.54, 6101.60, and 6101.78 of the Revised Code, such findings and appraisals are final and incontestable. In considering the appraisals made by the board, the court shall take cognizance of the official plan and of the degree to which it is effective for the purposes of the district. If the court finds that the estimated benefits appraised are less than the total costs of the execution of the official plan, exclusive of interest on deferred payments, it shall disapprove the report of the board of appraisers and may return said official plan to the board of directors of the conservancy district with the order for it to prepare new or amended plans or it may disorganize the district after having provided for the payment of all expenditures.

§ 6101.45 Payment of preliminary expenses; preliminary assessment; state share of expenses.

After the filing of a petition for the organization of a conservancy district, and before the district is organized, the cost of publication and other official costs of the proceedings shall be paid out of the general funds of the county in which the petition is pending. Such payment shall be made on the warrant of the county auditor or on the order of the court. If the district is organized, such costs shall be repaid to the county out of the first funds received by the district through levying of assessments or selling of bonds, or the borrowing of money. If the district is not organized, the cost shall

be collected from the petitioners or their bondsmen. Upon the organization of the district, the court shall make an order indicating a preliminary division of the preliminary expenses between the counties included in the district in approximately the proportions of interest of the various counties as estimated by said court. The court shall issue an order to the auditor of each county to issue his warrant upon the county treasurer of his county to reimburse the county having paid the total cost.

As soon as any district has been organized, and a board of directors of the conservancy district has been appointed and qualified such board may levy upon the property within the district in each of not more than two years a preliminary assessment, based upon the benefit determined by the court as provided by section 6101.08 of the Revised Code, but not to exceed three tenths of a mill on the assessed valuation thereof to be used for the purpose of paying expenses of organization, for surveys and plans, appraisals, estimates of cost, land options, and for other incidental expenses which may be necessary up to the time money is received from the sale of bonds or otherwise. This assessment shall be certified to the auditors of the various counties and by them to the respective treasurers of their counties. If such items of expense have already been paid in whole or in part from other sources, they may be repaid from the receipts of such levy, and such levy may be made although the work proposed may have been found impracticable or for other reasons is abandoned. The collection of such assessment shall conform in all matters to the sections of the Revised Code governing the collection of assessments levied by local political subdivisions, and the sections of the Revised

Code concerning the nonpayment of assessments levied by local political subdivisions shall apply. The board may borrow money in any manner provided for in sections 6101.01 to 6101.84, inclusive, of the Revised Code, and may pledge the receipts from such assessments for its repayment, the information collected by the necessary surveys, the appraisal of benefits and damages, and other information and data being of real value and constituting benefits for which said assessment may be levied. In case a district is disbanded for any cause before the work is constructed, the data, plans, and estimates which have been secure[d] shall be filed with the clerk of the court before which the district was organized and shall be matters of public record available to any person interested.

The board shall, upon levying the preliminary assessment, certify to the director of the department of natural resources an estimate of the amount of money the district will need to pay expenses of organization, for surveys and plans, appraisals, estimates of cost, land options and other incidental expenses up to the time money is received by the district from the sale of bonds or otherwise. The director, within sixty days after the receipt of such certification, shall upon finding that the organization and operation of the district contribute to the general welfare of the state, determine an equitable percentage of the amount so certified to be paid by the state. The director shall certify such determination to the board and shall cause to be paid to the district, out of any moneys appropriated to the department of natural resources for the purpose of assisting conservancy districts to pay expenses of organization, for surveys and plans, estimates of cost, land options and other incidental expenses, the amount de-

termined by him to be the equitable share of the state in meeting such expenses. The director shall make available to the board all plans, data, surveys or other information, which the department of natural resources or any division thereof may have, which will be beneficial to the board in furthering the purposes for which the district is organized.

§ 6101.48 Board of directors to levy assessment for bond fund.

After the appraisals record as approved by the court, or that part thereof from which no appeal is pending, has been filed with the secretary of the conservancy district as provided in section 6101.37 of the Revised Code, then from time to time, as the affairs of the district demand it, the board of directors of the conservancy district shall levy on all real property and on all public corporations, upon which benefits have been appraised, an assessment of such portion of said benefits as is found necessary by said board to pay the cost of the execution of the official plan including superintendence of construction and administration, plus one-ninth of said total to be added for contingencies, but not to exceed in the total of principal the appraised benefits so adjudicated.

Such assessment shall be apportioned to and levied on each tract of land or other property and each public corporation in said district in proportion to the benefits appraised, and not in excess thereof. Interest at a rate not to exceed ♦ **eight** per cent per annum, payable semi-annually shall be included in and added to the said assessment, but such interest shall not be considered as a part of the cost in determining whether or not the expenses and costs of making the improvement are equal to or in excess of the benefits appraised.

After the assessment is levied the board shall report it to the court for confirmation. Upon the entry of the order of the court confirming the assessment the clerk of the court shall transmit a certified copy of said order to the governing or taxing body of each political subdivision assessed and said governing or taxing body shall receive and file the same. Thereafter the board may order the issuance of notes in an amount not exceeding ninety per cent of the assessment in anticipation of the collection of the assessment.

After the court has confirmed the assessment the secretary of the conservancy district, at the expense of the district, shall prepare in duplicate an assessment record of the district. It shall be in a well-bound book indorsed and named "Conservancy Assessment Record of ..... District." It shall contain in tabular form a notation of the items of property appraised and the public corporations to which benefits have been appraised, the total amount of benefits appraised against each item or public corporation, and the total assessment levied against each item or public corporation. Where successive levies of assessment are made for the execution of the official plan and the acquisition or construction of improvements, the conservancy assessment record shall contain suitable notations to show the number of levies and the amount of each, to the end that the conservancy assessment record may disclose the aggregate of all such levies made up to that time.

Upon the completion of such record it shall be signed and certified by the president of the board and by the secretary of the conservancy district, attested by the seal of the district, and shall then be placed on file and become a permanent record in the office of said district. After the expiration of the thirty day period

for the payment of assessments as provided by section 6101.49 of the Revised Code, a copy of that part of the conservancy assessment record affecting lands or public corporations in any county shall be filed with the county auditor of such county.

If it is found at any time that the total amount of assessments levied is insufficient to pay the cost of works set out in the official plan or of additional work done, the board may make an additional levy to provide funds to complete the work, provided the total of all levies of such assessment exclusive of interest does not exceed the total of benefits appraised.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
Western Division

Filed August 29, 1977

No. C-1-75-5

MEMO

CONCERNED CITIZENS OF SOUTHERN OHIO, INC., et al.,
Plaintiffs,

vs.

THE PINE CREEK CONSERVANCY DISTRICT, et al.,
Defendants.

Before PECK, Circuit Judge, and PORTER and HOGAN, District Judges.

Per Curiam.

This case was filed in 1975. The plaintiffs sought a declaratory judgment declaring the Ohio Conservancy Act unconstitutional and enjoining the defendant Conservancy District from proceeding thereunder. A three-judge district court was convened and, on July 6, 1976, it concluded that the claims of the plaintiffs were foreclosed by *Orr v. Allen*, 248 U.S. 35 (1918) aff'g 245 Fed. 486 (W.D. Ohio 1917). Plaintiffs appealed to the United States Supreme Court. On February 22, 1977, the Supreme Court reversed and remanded for a full and independent consideration by this Court of three constitutional challenges made by the plaintiffs.

The three challenges leveled by the plaintiffs are as follows:

First — That it does violate due process for the conservancy courts to make the decision as to whether the conservancy districts which they will administer be formed.

Second — That the composition of the conservancy courts violates the one-man one-vote principle of *Baker v. Carr*, 369 U.S. 186 (1961) and *Reynolds v. Sims*, 377 U.S. 533 (1964).

Third — That the Act permits the disenfranchisement of freeholders affected by the decision to create a conservancy district because the statute creates a presumption that a local political body, such as a township, represents the views of all persons within its jurisdiction whenever it supports a petition proposing the creation of a conservancy district.

The parties stipulated that no evidentiary hearing was required and each side has submitted briefs. Oral argument was waived.

Ten Conservancy Districts organized and operating under the Act were granted leave to file a brief amicus and have done so.

The plaintiffs include a number of individual residents of, owners of property in, and taxpayers of the defendant District.

The defendant Pine Creek Conservancy District was organized in 1966 under Chapter 6101 of the Ohio Revised Code. This case was precipitated by an assessment process which was initiated in 1972.

The Conservancy Act was passed by the Ohio Legislature in its original form in 1914. In 1913 a series of disastrous floods occurred in a number of rivers within the State of Ohio. The purpose of the Act was to enable the establishment of various conservancy districts within the State as political subdivisions and public corporations invested with the power of carrying out flood prevention and control via, for example, regulating stream channels, arresting erosion, reclamation, irrigation, flow regulation, etc. Upon organization, the Districts have powers of condemnation, assessment, taxation, bond issue, contracting, construction, etc.

Initially a District could be organized only within one county. That, of course, was impractical and in the early days districts involving multi-counties were authorized.

The organization process commences with the filing of a petition in the office of the clerk of courts of one of the counties in which property to be affected is included. The petition must be signed by 500 freeholders or by a majority of the freeholders or by the owners of more than one-half of the property, in acreage or value, within the territory proposed to be organized.

The territory proposed to be organized must be generally described. The petition must outline the proposed improvement, allege the public need, and the necessity thereof and reasons therefor.

Upon the filing of the petition the Common Pleas Court in the county of filing determines whether the formal requirements have been met. Prior to that determination, the petitioners must file a bond "sufficient to pay all the expenses of the proceeding" in the event the Court should eventually decline to organize the District. Upon a determination of formal compliance,

the Common Pleas Court of each county containing territory involved is notified. There is thereupon established by the statute a "Conservancy Court" composed of one Common Pleas Court Judge from each county involved. Each judge has a single and even vote on matters which come before the Conservancy Court.

A judge, when sitting on the Conservancy Court, receives compensation therefor of $30.00 per day out of the District funds, in addition to his usual salary, and, if travel is involved, his necessary expenses (R.C. 6101.06 and 141.07).

The Court meets preliminarily for organizational purposes and fixes a time for hearing on the petition to establish. Notice by publication is required. Any property owner in the territory proposed may appear and object. (Some of the plaintiffs in this case were owners at the time of formation of Pine Creek. Some were not. No objections were made at that time by any plaintiff.)

At the hearing, if the Court determines that the formal requirements have been met and that the governmental purpose will be served thereby, the Court may declare the district organized. In this case (a) the governmental purpose of conservancy districts generally and Pine Creek in particular is conceded, (b) two of the plaintiffs' challenges go to the *formation* decision.

The purposes of the District are accomplished through two Boards appointed by the Court. One is a Board of Directors charged with formulating and executing and operating the project. The other is a board of appraisers which makes initial determinations of damage, benefits, lands to be condemned, valuations, "cost-benefit" determinations.

Under various sections of the Act the Court, in addition to the determination of whether to form or not and the appointment of the two Boards —

a) determines objections or exceptions to the appraisers' report respecting benefit, damage and appraisal;

b) determines whether the benefit of a project exceeds the cost;

c) reviews compensation awards for damages or taking of property (subject to the right of subsequent jury trial preserved to the owner);

d) reviews particular projects;

e) may set rates;

f) may levy taxes for certain recreational projects;

g) holds and conducts an annual meeting for examination of the annual report of the Board of Directors;

h) establishes the compensation to be paid to members of the Boards.

I.

The plaintiffs' first challenge is based on the principles involved in —

Tumey v. Ohio, 273 U.S. 510 (1927);
Ward v. Monroeville, 409 U.S. 57 (1972);
Gibson v. Berryhill, 411 U.S. 564 (1973).

The validity of the challenge depends on whether or not the decision to form is adjudicative and, if so, whether the pecuniary interest is "substantial." *Berryhill* at 579.

There is no dispute that the legislative or executive authority could have constitutionally formed conservancy and like districts without affording objectors a forum in which to object. The Ohio Legislature could

have constitutionally provided that a district could be formed by the simple collection and filing of petitions from individuals and bodies politic. There is no right to an adjudicative hearing at all in connection with the formation of such districts. *Hauck v. Little River District*, 239 U.S. 254 (1915). In *Tumey*, *Ward* and *Berryhill* the defendant had a right to the judicial or administrative hearing and therefore a right to an unbiased hearing officer. The questions involved in those cases were either clearly judicial or the administrative equivalent. The question of "formation vel non" in this case was not an adjudicative one but a legislative one. The hearing procedure relative to formation provided simply an additional check on the legislative process already petitioned for.

Furthermore, even were the cases relied on applicable to the proceeding involved, the pecuniary interest does not rise to the "substantiality" required. In the three cases relied on the hearing authority had before it an issue to decide and upon that decision the hearing authority, personally, or an entity in which the authority was interested was either actually or possibly benefited by a given determination — then and now. No *further* action or service on the part of the determining authority was called for. No question of compensation for future services was involved.

In this case the judges will be compensated for services rendered to and including the determination to form — whether the decision be to form or not form. As we have noted, the petitioners post a bond to accomplish just that. That factor was not involved in the cases relied on. Further, the pecuniary interest asserted as "conflicting" is "*compensation*" for future "services." Neither "compensation" nor "future services" was involved in the cases relied on. It is *not* claimed that the Ohio Statutory compensation is excessive. Conclusorily, and on balance, we hold simply that the pecuniary interest, under the circumstances of this case, is not substantial.

II.

The Conservancy Court of a District containing more than one county is composed of one judge per county. If a county having more than one judge is involved, the Common Pleas Court of that county selects one. If there are only two counties involved and the judges cannot agree, the Chief Justice of the State assigns a third judge from some county not involved. A majority of the judges is necessary for any decision if the membership is uneven. If even, a tie is broken by the vote of the Presiding Judge. Except in the latter instance, the vote of each judge bears the same weight. (R.C. 6101.07)

The Pine Tree District lies partly in Lawrence County and partly in Scioto County. They adjoin. In neither instance is the entire county within the District. The population of Lawrence County is substantially less than the population of Scioto County and has been at all times relevant to this controversy. The Common Pleas Court judges in Ohio are elected by popular vote in counties at large (the electors of each county elect the judge or judges of that county). Based on *Baker v. Carr*, 369 U.S. 186 (1961), *Reynolds v. Sims*, 377 U.S. 533 (1964) and similar subsequent cases, it is plaintiffs' claim that equal protection is denied to the voter of Scioto County in that he has less to say in choosing the membership of the Court than does the Lawrence County voter.

The majority of the functions of the Conservancy Court are judicial. The plaintiffs on brief point out that judicial powers exercised by the Court include determinations under R.C. 6101.07, 6101.33 and 6101.28 at a minimum. The "one-man one-vote" decisions do not apply to the selection of judges who "do not represent people — they serve people." *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), aff'd, 409 U.S. 1095 (1973).

Nor does the Conservancy District — taking into consideration all of its powers, judicial and otherwise — exercise general governmental power. The citizens and electors of Scioto County as such have no interest in, nor are they as such affected by the action of the District. In order to successfully invoke the principles on which plaintiffs rely, it must be shown that the vote of an elector, whose interests as such are governmentally involved, was assigned more or less weight than other electors; or stated otherwise, equality of interest must receive equality in voter weight. There is simply no relationship of equality between voters or citizens of either or both counties in the District, because obviously many of the voters and residents of each county have no interest to be affected by the District. The facts do not warrant applying the principle the plaintiffs urge.

An Ohio Conservancy District, such as Pine Creek, is not a general governmental agency — it exists for the limited purpose of conservancy (and more particularly flood control). It compares to the water district involved in *Salyer Land Co. v. Tulare Water District*, 410 U.S. 719 (1973). In that case the Court declined to extend the principle to such special or limited purpose agencies (at p. 430) —

> "We hold therefore that the popular election requirements enunciated by *Reynolds, supra*, and succeeding cases are inapplicable to elections such as the general election of appellee Water Storage District."

Finally, if the Ohio Legislature had reserved the right to appoint the members of the Conservancy Court and, upon formation, appointed one resident of each county to it, there would clearly be no *Reynolds v. Sims* problem. There is no constitutional right to "vote" on the membership of the Courts of such Districts, as it does not seem to this Court that the Ohio scheme has extended the franchise to the selection process by designating for membership someone who had been elected to another position. The members of the Conservancy Court are *not elected to that office*. They are essentially appointed by the legislature. We doubt it has ever been, even in passing, stated in Ohio that someone was "elected" to a conservancy district. Cf., *Sailors v. Board*, 387 U.S. 105 (1967) in which the Court, dealing with a local agency, pointed out "the delegates from the local school boards, not the school electors, select the members of the county school board. While the school electors elect the members of the local school boards and the local boards, in turn, select delegates. . . ." and held the system "is basically appointive rather than elective." It is our conclusion that the Ohio system involves essentially legislative selection rather than voter election — the facts are essentially more comparable to the facts in *Sailors* than in *Avery v. Midland Co.*, 390 U.S. 474 (1967).

III.

Under O.R.C. 6101.05 the establishment of a district is initiated by a petition signed either by

500 freeholders

or

a majority of the freeholders

or

the owners of one-half the property in acreage or amount

The statute then provides that —

> "[A] petition may be signed by the governing body of any public corporation lying wholly or partly within the proposed district . . . and when so signed by such governing body such a petition . . . shall fill all the requirements of representation upon such petition of the freeholders of such public corporation, as they appear on the tax duplicate; and thereafter it is not necessary for individuals within such public corporation to sign such petition."

At the most, the statute extends a presumption if a public corporation signs. For R.C. 6101.08 clearly provides that

> "any owner of real property in a proposed district who individually has not signed such a petition and who wishes to object to the organization and formation of the district shall . . . file his objections . . ."

A hearing is required and under the same section such an objector, as an "interested party," may appeal through the Ohio courts.

The petition which initiated the formation of Pine Creek was executed by three townships and one village (as well as individuals resident in other areas).

The plaintiffs assert this to be a denial of equal protection to those who resided in the three townships and one village and who opposed the formation of the District.

Plaintiffs designate the discrimination on brief as follows:

> "this has worked an unequal effect upon the plaintiffs owning land in these political subdivisions; persons owning land elsewhere in the District were free to support or oppose the district as they wished, but they were not."

This Court is at a loss to understand plaintiffs' argument — and plaintiffs cite no relevant authority to support it.

In the first place, the only thing the petition accomplishes is to secure a *consideration* of the question of formation. The purpose of the petition is and was merely to demonstrate substantial support as a requisite for consideration. Equating the votes of the township trustees to the votes of the freeholders in the township *for that purpose* is not discriminatory — it is merely alternative.

In the second place — wherein lies the discrimination, the property of any freeholder in Ohio is within the territory of *some* public corporation (city, village, or township). All freeholders are treated the same. If a given public corporation signs or does not sign, it carries the same result. Any freeholder living anywhere within the district is counted *if* his public corporation signs. That is constant. The statute does not discriminate. The different facts do.

In the third place, the assertion of the plaintiffs as a necessary part of their claim that "persons owning land in these (signatory) political subdivisions . . . were not . . . free to support or oppose the district" is simply not so. The statute clearly creates no presumption relative to the hearing as distinguished from the preliminary examination and no conclusive presumption at all. Any freeholder who has not in fact signed (whether in or out of the area of a signatory public corporation) may appear, except, object and appeal.

The Court concludes that O.R.C. Chapter 6101 is constitutional. A proposed judgment consistent herewith may be presented.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
Western Division

Filed Sept. 19, 1977

Case No. C-1-75-5

CONCERNED CITIZENS OF SOUTHERN OHIO, INC., et al.
Plaintiffs

vs.

THE PINE CREEK CONSERVANCY DISTRICT, et al.
Defendants

JUDGMENT ORDER

This matter came on for hearing upon remand from the United States Supreme Court for a full and independent consideration by this three-judge district court of the constitutional challenges made by the plaintiffs. The parties stipulated that no evidentiary hearing was required, oral argument was waived, and each side has submitted briefs. Ten Conservancy Districts organized and operating under the Act were granted leave to file a brief amicus and have done so. This three-judge court has duly considered the matter.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that the claims of the plaintiffs that various sections of Chapter 6101 of the Ohio Revised Code

are unconstitutional are OVERRULED, REJECTED AND DISMISSED.

/s/ JOHN W. PECK
United States Circuit Judge

/s/ DAVID S. PORTER
United States District Judge

/s/ TIMOTHY S. HOGAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO
Eastern Division

Filed Oct. 19, 1977

Case No. C-1-75-5

CONCERNED CITIZENS OF SOUTHERN OHIO, INC., et al.,
Plaintiffs-Appellants

v.

THE PINE CREEK CONSERVANCY DISTRICT, et al.,
Defendants-Appellees

NOTICE OF APPEAL

Appellants, Concerned Citizens of Southern Ohio, Inc., C. G. Dalton, Asbury Arnett, Charles Bihl, John K. McHenry, Harvey Gillespie, Leonard Morris, and Leon A. Dalton, appeal to the Supreme Court of the United States from the judgment order of this Court entered September 19, 1977, overruling, rejecting, and dismissing the claims that various sections of Chapter 6101 of the Ohio Revised Code are unconstitutional.

This appeal is taken pursuant to 28 U.S.C.A., Section 1253. The Sixth, Fifth, and Third Claims for relief of Appellants' complaint, asserting that Chapter 6101 of the Ohio Revised Code is unconstitutional were

dismissed. The judgment order from which this appeal is taken is in favor of the validity of the statute.

Respectfully submitted,

/s/ MICHAEL N. TOUSEY
Trial Attorney

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Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was served upon Duke W. Thomas, Vorys, Sater, Seymour & Pease, 52 East Gay Street, Columbus, Ohio 43215, Attorneys for all Defendants and Appellees, by ordinary mail this 17th day of October, 1977.

/s/ MICHAEL N. TOUSEY